BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	MB Docket No. 08-214
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7709-P
Complainant,	)	
v.	)	
Time Warner Cable Inc.,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7822-P
Complainant,	)	
v.	)	
Bright House Networks, LLC,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7829-P
Complainant,	)	
v.	)	
Cox Communications, Inc.,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7907-P
Complainant,	)	
v.	)	
Comcast Corporation,	)	
Defendant	)	
	)	
TCR Sports Broadcasting Holding, L.L.P.,	)	File No. CSR-8001-P
Complainant,	)	
v.	)	
Comcast Corporation,	)	
Defendant.	)	

To: The Commission

JOINT OPPOSITION OF COMPLAINANTS HERRING BROADCASTING, INC. D/B/A WEALTHTV AND TCR SPORTS BROADCASTING HOLDING, L.L.P. D/B/A MID-ATLANTIC SPORTS NETWORK TO DEFENDANTS' EMERGENCY MOTION FOR STAY

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Complainants Herring Broadcasting, Inc. d/b/a WealthTV ("WealthTV") and TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network ("MASN") (collectively, "Complainants"), by their undersigned counsel, respectfully submit this joint opposition to Defendants' Emergency Motion for Stay of the Media Bureau's December 24, 2008 Memorandum Opinion and Order ("*Jurisdiction Order*") in the above-captioned matters. For the reasons set forth below, and in the Opposition to Defendants' Emergency Application for Review filed concurrently herewith, Defendants' Emergency Motion for Stay ("Stay Mot.") should be denied because Defendants have failed to satisfy their high burden under the familiar four-pronged test for a stay pending further review.

INTRODUCTION

In Section 616 of the Cable Act, Congress specifically directed the Commission to ensure that its regulations "provide for expedited review of any complaints made by a video programming vendor" alleging "discriminati[on] in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors." 47 U.S.C. § 536(a)(3)-(4). Faithful to that congressional directive, the Media Bureau's *Hearing Designation Order* unequivocally and repeatedly "order[ed] that the ALJ return Recommended Decisions in these matters to the Commission pursuant to the procedures set forth below within 60 days." *Memorandum Opinion and Hearing Designation Order*, DA 08-2269, ¶¶ 1-3 (rel. Oct. 10, 2008) ("*HDO*"). In the face of the ALJ's outright defiance of that order – a critical component of which the ALJ disparaged as "ludicrous" – the Media Bureau properly held that the ALJ's jurisdiction had expired and reclaimed authority to decide the complaints itself.

Defendants have failed to demonstrate that they are likely to prevail on the merits of their novel legal challenge to the Media Bureau's *Jurisdiction Order*. As a threshold matter,

Defendants' Emergency Application for Review is a procedurally improper request for interlocutory review. Moreover, Defendants' fundamental contention on the merits is that an ALJ has the discretion to defy clear directives of the Commission and its Bureaus regarding the time frame for resolving matters designated for hearing. There is simply no support in law or logic for that extraordinary proposition. Numerous FCC regulations confirm that the Commission and its Bureaus have authority to direct the timing of a decision. The Media Bureau's *Jurisdiction Order* did not constitute an "unlawful seizure" of the ALJ's jurisdiction; rather, it vindicated the right of the Bureau (and the Commission) to insist that ALJs respect the proper bounds of that jurisdiction.

Moreover, even if Defendants could prevail on the merits, their claimed legal injuries – "wasted and unrecoverable" litigation costs – are not cognizable as a basis for a stay. The law is well-settled that "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough to satisfy the requirement of irreparable injury." *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Complainants – not Defendants – would be harmed if the stay is granted; in contrast to Defendants, Complainants are small companies that have already waited a year or more for resolution of their complaints that Defendants have unlawfully discriminated against them in favor of affiliated programming networks. A stay of the Media Bureau's *Jurisdiction Order* will delay even further the date by which Complainants' claims under Section 616 will be resolved. Especially given Congress's directive that the Commission "provide for expedited review," 47 U.S.C. § 536(a)(4), neither the balance of equities nor the public interest supports a stay. The Commission should deny Defendants' Motion so that the Media Bureau may proceed to an expeditious resolution of the carriage disputes.

BACKGROUND

The six program carriage complaints in this consolidated docket were filed between December 2007 and July 2008.[1] In October 2008, after briefing on the six complaints was completed in accordance with the Commission's regulations, *see* 47 C.F.R. § 76.1302, the Media Bureau issued its *HDO*. *See HDO* ¶ 6 & n.15. In that order, the Media Bureau found "that the complainants ha[d] established a *prima facie* showing of a violation of the program carriage rules in each case." *HDO* ¶ 7. The Media Bureau also found "that the pleadings and supporting documentation present several factual disputes, such that we are unable to determine on the basis of the existing records whether we can grant relief based on these claims." *Id.* The Media Bureau thus designated the six cases for hearing before an ALJ. *Id.* ¶¶ 122, 126, 130, 134, 138, 142. However, cognizant of the need for an "expedited review," 47 U.S.C. § 536(a)(4), the Media Bureau "order[ed] that the ALJ return Recommended Decisions in these matters to the Commission pursuant to the procedures set forth below within 60 days." *HDO* ¶ 1; *see id.* ¶¶ 2-3. The Media Bureau reiterated this 60-day deadline no fewer than *14 times* in the *HDO*. *See id.* ¶¶ 1-3, 58, 85, 89, 119, 120, 124, 128, 132, 136, 140, 144.

By order dated October 21, 2008, Chief Administrative Law Judge Sippel assigned the consolidated cases to Judge Arthur Steinberg. *Order*, FCC 08M-43. Initially, on October 23, 2008, Judge Steinberg ruled that the hearing would be limited to specific issues identified in the Erratum to the *HDO* and set a procedural schedule calling for the hearing to commence on November 17, 2008, and the filing of post-hearing briefs by December 10, 2009, in an effort to comply with the *HDO*. *Order*, FCC 08M-44. The order further determined that "due to the time constraints imposed in the *HDO* discovery would not be practicable." *Id.* (citation omitted).

[1] The *HDO* also concerned a carriage dispute brought by NFL Network against Comcast. NFL Network is not a party to this pleading.

However, at the ensuing prehearing conference only four days later, Judge Steinberg reversed himself, called the Media Bureau's 60-day deadline "ludicrous," and declared that he would not even attempt to abide by that directive. *See* Hearing Tr. at 36, 38 (Oct. 27, 2008).[2] Two days later, he suspended the October 23, 2008 scheduling order. *Order*, FCC 08M-45. Moreover, notwithstanding his oral rulings at the October 27 prehearing conference, Judge Steinberg took almost another month – until November 20 – to issue virtually the same rulings in written form in response to Defendants' motion for clarification of the *HDO*. *Order*, FCC 08M-47.

Four days later, Chief Judge Sippel announced that Judge Steinberg was retiring from the bench in early January 2009 and reassumed control over the consolidated cases. *Order*, FCC 08M-48. Chief Judge Sippel indicated at a subsequent hearing that he had known about Judge Steinberg's impending retirement but had nevertheless assigned the cases to him with the "good faith" "hope" – though admittedly not with any "expectation" – that Judge Steinberg would adhere to the 60-day directive and therefore "might be able to hear this case before he left." Hearing Tr. at 62 (Nov. 25, 2008). "It didn't work." *Id.* Judge Sippel also indicated that he would treat Judge Steinberg's rulings – including his refusal to attempt to abide by the Media Bureau's 60-day deadline – as "rule of the case, unless I'm directed to do otherwise by a higher authority." *Id.* at 97; *see also id.* at 104. After holding another prehearing conference, Judge Sippel issued a scheduling order on December 1, 2008 that set a hearing date of March 17, 2009 – more than *three months* after the Media Bureau had directed the ALJ to issue a recommended decision.[3]

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[2] Judge Steinberg also reversed his earlier determination and declared at the conference that, rather than limiting the hearing to those issues identified in *HDO*, he would instead conduct a "*de novo* hearing." Oct. 27 Hearing Tr. at 48.

[3] Defendants' Stay Motion incorrectly suggests that the Enforcement Bureau "acquiesced" in this schedule. First, the Enforcement Bureau never acquiesced in Judge Steinberg's decision to

On December 24, 2008, upon motions by WealthTV and MASN and after full briefing, the Media Bureau issued its *Jurisdiction Order*. Interpreting its own prior order, the Media Bureau first noted that "[t]he expedited deadline for issuing the recommended decision was a critical component of the HDO." *Jurisdiction Order* ¶ 15. Echoing Congress's directive in Section 616, the Media Bureau pointed out that "administrative delay in resolving program carriage disputes could result in irrevocable harm to an independent programmer . . . and potentially deprive viewers of access to desired programming." *Id.* Accordingly, the Media Bureau held that "the Administrative Law Judge's limited grant of authority under the HDO to issue a recommended decision by December 9, 2008, has expired under the terms of the HDO, and the ALJ thus no longer has delegated authority to conduct hearings in the above-captioned proceedings." *Id.* ¶ 14. The Media Bureau then stated that it would "proceed to resolve the carriage disputes" in the captioned cases using the various "procedural tools at its disposal" under the Commission's regulations. *Id.* ¶¶ 16 & 18 n.57.

STANDARD OF REVIEW

The well-established standards for a stay of administrative action are "stringent," *e.g.*, *United States v. Weston*, 194 F.3d 145, 150 n.3 (D.C. Cir. 1999), and the Defendants face a heavy burden to prove they are entitled to this "extraordinary remedy." *Brotherhood of Ry. & S. S. Clerks, Freight Handlers, Express & Station Employees v. National Mediation Bd.*, 374 F.2d 269, 275 (D.C. Cir. 1966) ("a stay pending appeal is always an extraordinary remedy"); 11 Charles Alan Wright, et al., *Federal Practice & Procedure* § 2904 (2d ed. 1995 & Supp. 2008) (movants face a "heavy" burden and requests for stays will usually be denied).

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refuse to adhere to the 60-day deadline in the *HDO*. Moreover, Judge Sippel made clear that his prehearing schedule was issued "solely as a compromise," and despite the Enforcement Bureau's request for a more accelerated schedule. Nov. 25 Hearing Tr. at 141. The Enforcement Bureau has expressly disagreed with the cable companies' characterization of its position. *See* Enforcement Bureau's Comments (Dec. 31, 2008).

The factors governing the issuance of a stay are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (citing *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925). To obtain a stay, Defendants must show either that they have a "high probability of success on the merits" or that the "balance of equities or the public interest strongly favors the granting of a stay." *Cuomo v. NRC*, 772 F.2d 972, 974, 978 (D.C. Cir. 1985) (per curiam). Defendants cannot make either showing here.

ARGUMENT

I. DEFENDANTS ARE UNLIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIM

As set forth more fully in Complainants' Opposition to Defendants' Emergency Application for Review ("Opp'n to Emergency Application for Review"), Defendants' challenge to the *Jurisdiction Order* is unlikely to prevail on the merits.

First, Defendants are not likely even to obtain review of the merits of the *Jurisdiction Order* at this time because their Application for Review is a procedurally improper request for review of an interlocutory ruling by the Media Bureau. *See* Opp'n to Emergency Application for Review 4-6. The Commission's regulations, specifically 47 C.F.R. § 76.10, provide that, subject to narrow exceptions, "no party may seek review of interlocutory rulings until a decision on the merits has been issued by the staff." 47 C.F.R. § 76.10(a)(1); *see also Second Report and Order*, 9 FCC Rcd 2642, ¶ 23 (1993) ("[i]nterlocutory review shall be permitted only after the staff has ruled on the merits"). The *Jurisdiction Order* clearly does not constitute a "decision on the merits."

No exception to § 76.10 permits the Defendants to seek review of the *Jurisdiction Order* at this time. Contrary to the Defendants' suggestion, the Media Bureau did not terminate anyone's "right" to "participate as a party to the proceeding." 47 C.F.R. § 76.10(a)(2)(i). All parties will continue to be full participants in the proceedings before the Media Bureau. Nor is there any basis for the Commission to waive § 76.10(a)(1) "for good cause." To the contrary, adherence to § 76.10(a)(1) is particularly appropriate in this case for two reasons. First, Defendants' complaints about the supposedly "far less thorough" process of the Media Bureau, Stay Mot. at 7, are incurably premature, without foundation, and impossible to assess given that the Bureau has not yet set forth what process it will use to resolve the carriage complaints. *See* Opp'n to Emergency Application for Review 22. Second, all of the substantive arguments made by Defendants would be rendered moot were the Bureau to decide the carriage complaints *against* MASN or WealthTV on the merits. That possibility renders it inadvisable and inefficient to address the merits of Defendants' Application for Review now.

Second, Defendants are simply wrong on the merits. The Media Bureau had clear authority to establish – and enforce – a deadline for recommended decision in its hearing designation to the ALJ. Defendants' arguments all stem from the mistaken premise that an ALJ's jurisdiction is somehow immune to limitation by the designating authority as to timing and issues for decision. That premise is flatly contrary to fundamental tenets of administrative law. The Administrative Procedure Act clearly provides that all authority of an ALJ is "[s]ubject to published rules of the agency and within its powers." 5 U.S.C. § 556(c); *see Attorney General's Manual on the Administrative Procedure Act* 75 (1947) ("The phrase 'subject to the published rules of the agency' is intended to make clear the authority of the agency to lay down policies and procedural rules which will govern the exercise of such powers by presiding

officers.") (citation omitted). Accordingly, it is not uncommon for federal agency regulations to establish mandatory deadlines for ALJ decisions. *See* 16 C.F.R. § 3.51(a) (FTC regulation providing that an ALJ "shall file an initial decision within ninety (90) days after closing the hearing" and "[i]n no event shall the initial decision be filed any later than one (1) year after the issuance of the administrative complaint"); Morell E. Mullins, *Manual For Administrative Law Judges: 2001 Interim Internet Edition* 66 ("To speed up administrative proceedings, Congress by statute, and some agencies by regulation, have sometimes imposed time limits for completion of some or all of the steps in formal administrative proceedings.") (internal footnotes omitted).

The Commission's regulations similarly permit the Bureau, acting on delegated authority, to establish deadlines for ALJ decision. As the Commission has explained, "[t]ime limits on the ALJs are permissible." *Hearing Process Order*, 5 FCC Rcd 157, ¶ 40 n.26 (1990). Indeed, the Commission can specify the exact date and location for the hearing. *See* 47 C.F.R. §§ 1.241(b); 1.253(a). Such directives properly limit the delegated "authority" of the ALJ, and the ALJ is not free to ignore them as Judge Steinberg and Chief Judge Sippel did. As the Commission has clearly ruled, "an ALJ may not countermand a designation order issued under delegated authority as to matters already considered by the delegating authority." Memorandum Opinion and Order, *Tequesta Television*, 2 FCC Rcd 41, ¶ 10 (1987); *see also* Memorandum Opinion and Order, *Rio Grande Broadcasting*, 6 FCC Rcd 7464, ¶ 4 (Rev. Bd. 1991) (affirming decision of ALJ to deny a continuance of a hearing set by a bureau because "the ALJ reasonably concluded that a continuance was *beyond his authority*" as the request was based on issues considered by the bureau) (emphasis added); *see also* Opp'n to Emergency Application for Review 6-13.

Here, the Media Bureau could not have been clearer in establishing a 60-day deadline for a recommended decision by the ALJ in the *HDO*. *See supra* p. 3 (noting that the *HDO* referred

to the 60-day deadline 14 times). In so doing, the Media Bureau was acting pursuant to an express congressional directive to provide "expedited review" to program carriage complaints. The Media Bureau was thus well within the bounds of reasonableness in concluding in the *Jurisdiction Order* that "[t]he expedited deadline for issuing the recommended decision was a critical component of the HDO," *id.* ¶ 15, and that the ALJ's default of that responsibility led to the "expiration" of its authority.

Finally, Defendants are not likely to succeed on the merits of their claim that the Media Bureau's procedures violate due process. Again, Defendants' contentions are, at best, premature. As the Media Bureau noted in the *Jurisdiction Order*, it has numerous procedural tools available to resolve the instant carriage disputes, including "'answers to written interrogatories, depositions or document production,'" and also an "'evidentiary hearing, . . . as it deems appropriate.'" *Id.* ¶ 18 n.57 (quoting 47 C.F.R. § 76.7(e)-(f)).[4] The Media Bureau has not indicated which of these measures it will use. Defendants apparently fear that the Media Bureau's procedures will be deficient, but they are not free to prejudge the issue. Any due process challenge cannot ripen into a cognizable claim unless and until the Media Bureau decides on and implements its procedures for resolving the instant carriage disputes. *See, e.g.*, *Cronin v. FAA*, 73 F.3d 1126, 1131 (D.C. Cir. 1996) (claims of airline pilot and labor organizations that FAA's alcohol and drug testing regulations did not afford due process were not ripe where it was uncertain whether any employees would suffer adverse actions without benefit of due process). Defendants' due process arguments are not ripe and therefore create no basis for a stay of the Media Bureau's *Jurisdiction Order*.

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[4] Complainants do not believe that due process principles require a trial-type hearing, but in all events, defendants are simply wrong to assert (Application for Review at 19) that the Bureau is "not authorized and does not have the tools" to conduct an evidentiary hearing.

II. DEFENDANTS WILL NOT BE IRREPARABLY HARMED ABSENT A STAY

Defendants argue that they will suffer irreparable harm from the Media Bureau's order because the Bureau may initiate a discovery process, requiring defendants to incur litigation expenses that they claim will be "wasted and unrecoverable." Stay Mot. at 6-7. That argument has no merit for at least two independent reasons.

First, it is well-settled that litigation costs cannot, as a matter of law, constitute irreparable harm. Defendants' own cited authority makes that plain. *See Virginia Petroleum Jobbers Ass'n*, 259 F.3d at 925 ("[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to show irreparable harm); *see also McSurely v. McClellan*, 697 F.2d 309, 317 n.13 (D.C. Cir. 1982) (litigation costs "do not rise to the level of irreparable injury"); Memorandum Opinion and Order, *Amendment of the Commission's Rules Regarding the 37.0-38.6 Ghz and 38.6-40.0 Ghz Bands*, 15 FCC Rcd 10579, ¶ 6 (2000) (delays and litigation costs are insufficient to warrant a stay); Memorandum Opinion and Order, *Ocean Pines FM Partnership*, 4 FCC Rcd 3490, ¶ 2 (Rev. Bd. 1989) (petitioner's "claim that it would be subjected to unnecessary and additional litigation costs does not amount to judicially recognized irreparable injury").

Second, the Media Bureau has not yet indicated whether it will order document production, depositions, answers to written interrogatories, or other discovery. The Bureau simply noted, in rejecting Defendants' argument that it would be unable to resolve any factual disputes, that it had "procedural tools at its disposal to have the parties supplement the existing record in order to resolve [such] disputes." *Jurisdiction Order* ¶ 18 n.57. That is another reason why Defendants' purported fear of discovery expenses does not constitute irreparable injury. Such injury must be "both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *accord* Order, *Alpine PCS, Inc.*, 23 FCC

Rcd 10485, ¶ 17 (2008). Neither courts nor the Commission will grant injunctive relief "against something merely feared as liable to occur at some indefinite time." *Wisconsin Gas Co.*, 758 F.3d at 674 (internal quotation marks omitted). Because Defendants' assertion that they will have to engage in duplicative and burdensome discovery is entirely speculative, it cannot amount to a showing of irreparable harm.

Moreover, Defendants have neither produced any documents (MASN produced thousands of documents in two productions) nor furnished any witness testimony in the proceeding before the ALJ. They have engaged only in "paper" discovery, submitting document requests, objections to document requests, and designations of witnesses and exhibits. There is no reason to believe that any additional discovery ordered by the Media Bureau would be "wasted" if the Commission were later to vacate the Media Bureau's order and return this matter to the ALJ. The same documents and testimony would be relevant to any ALJ proceeding. The reverse, however, is not true. Indeed, if the Commission were to stay the Media Bureau order and allow discovery to proceed before the ALJ, that discovery could indeed be "wasted" if the *Jurisdiction Order* is ultimately upheld. The Media Bureau has already explained that, in its view, the ALJ "greatly expanded the designated issues for hearing," and improperly "decided to disregard the facts and conclusions recited in the HDO, and instead give *de novo* consideration to *all* issues in the matter." *Jurisdiction Order* ¶¶ 16-17. Thus, the broader discovery ordered by the ALJ could well prove to be unnecessary and irrelevant. The danger of "wasted" discovery is from granting a stay, not denying one.

III. COMPLAINANTS WILL BE HARMED BY A STAY

Even if Defendants could demonstrate irreparable injury in the absence of a stay – which they cannot – "[t]he persuasiveness of petitioner's threatened irreparable harm is greatly diminished when its prevention will visit similar harm on other interested parties." *Ambach v.*

Bell, 686 F.2d 974, 979 (D.C. Cir. 1982); *see Virginia Petroleum Jobbers Ass'n*, 259 F.3d at 925 ("[W]e must determine whether, despite showings of probable success and irreparable injury on the part of petitioner, the issuance of a stay would have a serious adverse effect on other interested persons."). The other parties to this proceeding – Complainants – will be harmed by the issuance of a stay. First, they will actually suffer the injury that Defendants only claim: they will be forced to engage in discovery before the ALJ, much of which would be deemed irrelevant by the Media Bureau were the *Jurisdiction Order* ultimately affirmed.

More importantly, Complainants – not Defendants – will suffer truly irreparable injuries. As the Media Bureau recognized, the ALJ's unwarranted delay would have rendered a Commission decision on MASN's program-carriage complaint impossible until well into the next Major League Baseball season, permanently depriving hundreds of thousands of customers of the opportunity to watch Washington Nationals and Baltimore Orioles games. *See Jurisdiction Order* ¶ 15 & n.45. Similarly, WealthTV will be unable to reach its desired customers and will be deprived of an important source of income until its complaint is resolved. As the Bureau noted, delay may drive competing unaffiliated programmers such as WealthTV out of business altogether. *See id.* Thus, it is Complainants, not Defendants, who face the prospect of injuries that cannot readily be addressed through a later award of money damages. Defendants have pointed only to the non-cognizable harm of litigation costs. For all of these reasons, the balance of harms weighs against the issuance of a stay.

IV. A STAY WOULD DISSERVE THE PUBLIC INTEREST

The public interest will benefit by an expeditious resolution of MASN's and WealthTV's program-carriage complaints. Congress directed "expedited review," and the Media Bureau directed the ALJ to issue a recommended decision within a specific period of time. The ALJ now having defaulted on that obligation, the Media Bureau intends to fulfill it. Staying that

proceeding would only prolong the time during which cable customers are deprived of access to desired programming.

Defendants contend that a stay would serve the public interest by conserving the Media Bureau's resources and by preserving the "independence" of the ALJ to disregard the 60-day deadline set by the Bureau. That "independence," however, does not permit an ALJ to flout clear directives from the Commission and its Bureaus. The Media Bureau exercises the delegated authority of the Commission with respect to program carriage. It has "sole discretion" to delegate carriage proceedings, or discrete factual issues in carriage proceedings, to ALJs, and it may limit the authority of an ALJ through both substantive decisions and procedural instructions in its designation order. *See* Opp'n to Emergency Application for Review 6-13.

The Media Bureau's *Jurisdiction Order* promoted the public interest in the proper functioning of the Commission by protecting the Commission's authority and by moving towards a prompt disposition of MASN's and WealthTV's complaints. Given that two successive ALJs refused to adhere to the 60-day deadline, which was a "critical component" of the Bureau's designation order, *Jurisdiction Order* ¶ 15, the Media Bureau had no choice but to reassert its authority over the dispute and to resolve MASN's and WealthTV's program-carriage complaints on its own. Addressing such complaints without assistance from an ALJ is well within the Bureau's discretion and an appropriate use of the Bureau's resources. *See Second Report and Order* ¶ 32 (staff has discretion to resolve factual issues on its own or to refer issues to an ALJ); *see also* Opp'n to Emergency Application for Review 19-21. To the extent that any Bureau resources have been diverted from the DTV transition, this is the unfortunate consequence of the ALJ's decision to ignore the Bureau's directives. A stay would further

undermine the public interest by allowing the ALJ to continue with a proceeding that is *ultra vires* and that cannot result in a timely ruling on MASN's and WealthTV's complaints.

CONCLUSION

For the foregoing reasons, the Commission should promptly deny Defendants' Emergency Motion for Stay so that the Media Bureau can expeditiously resolve the pending program carriage complaints.

Respectfully submitted,

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Dated: January 6, 2009

CERTIFICATE OF SERVICE

I, David C. Frederick, hereby certify that, on January 6, 2009, copies of the foregoing document were served as follows:

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